Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
White v. GTE	)	
	)	WT Docket No. 00-164
Petition for Declaratory Ruling Regarding	)	
Whether Certain CMRS Practices Violate	)	
the Communications Act	)	

COMMENTS OF AT&T WIRELESS SERVICES, INC.

Pursuant to the Commission's Public Notice, released September 20, 2000,[1/] AT&T Wireless Services, Inc. ("AT&T") hereby submits its comments on the Petition for Declaratory Ruling filed by James J. White, et al. in the above-captioned proceeding.[2/] Petitioners ask the Commission to declare that certain CMRS practices, including billing in whole-minute increments, are unjust and unreasonable under Section 201(b) of the Communications Act. Petitioners also argue that their state law claims in the underlying court case, White v. GTE Corp., are not preempted under Section 332(c)(3) of the Act.

The Petition should be denied. First, the Commission has already concluded that billing practices such the ones challenged by Petitioners are reasonable under Section 201(b). Second, contrary to Petitioners' assertion, their state law claims and requested relief would necessarily entail precisely the kind of rate regulation that Section 332 prohibits. Finally, to the extent Petitioners ask for a ruling on the specific facts and circumstances of their case, such a request is

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1/ Public Notice, Public Comment Invited, Commission Seeks Comment on Petition for a Declaratory Ruling Regarding Whether Certain CMRS Practices Violate the Communications Act, WT Docket No. 00-164, DA 00-2083 (released Sept. 20, 2000).

2/ Petition for Declaratory Ruling on Issues Contained in Count I of "White vs. GTE," United States District Court for the Middle District of Florida, Case No. 97-1859-CIV-T-26C (Feb. 2, 2000) ("Petition").

inappropriate. The Commission has twice refused to issue such rulings, concluding that they are best made in the first instance by a trial court based on the specific claims before it.

I. CHARGING IN WHOLE MINUTE INCREMENTS AND SIMILAR PRACTICES ARE CONSISTENT WITH SECTION 201(b)

In their declaratory ruling request, Petitioners ask the Commission to declare that certain CMRS practices are unjust and unreasonable under Section 201(b) of the Communications Act.[3/] In particular, Petitioners allege that billing in whole minute increments, or "rounding up" (which Petitioners define to include charging for airtime used during the call connection process, and billing for unconnected but lengthy ring time calls) violates Section 201(b).[4/]

The Commission has already given its unequivocal answer to Petitioners' request for a ruling: rounding up is neither unjust nor unreasonable. In the SBMS Order, the Commission found that charging on a whole minute basis is the most common billing practice for CMRS and one that reflects carriers' cost of providing service.[5/] As such, rounding up is "clearly among those [practices] which CMRS providers, consistent with Section 201(b) of the Act, have discretion to implement for their services."[6/] As for the other practices challenged by Petitioners, which involve charges for "non-communication" time, the Commission has provided sufficient, indeed dispositive, guidelines for the court to resolve Petitioners' allegations. Basing charges on a simplified method that still reflects costs, such as rounding up or charging for incoming calls,

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3/ Petition at 4.

4/ Petition at 2-3; Reply of Petitioners to Opposition of GTE, et al. at 3 (filed Sept. 6, 2000) ("Petitioners' Reply").

5/ Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers When Charging for Calls in Whole-Minute Increments, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19904 (1999) ("SBMS Order").

6/ Id.

does not violate Section 201(b).[7/] The Commission should confirm the lawfulness of these practices, for the reasons set forth in the SBMS Order.[8/]

II. PETITIONERS' STATE LAW CLAIMS ARE PREEMPTED UNDER SECTION 332

The state law claims raised by Petitioners are the type that the Commission has found to be preempted by Section 332 of the Communications Act because the relief sought would entail the determination and regulation of rates for CMRS service.[9/] In the SBMS Order and again in the WCA Order, the Commission held that the term "rates" under Section 332 includes both rates

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[7/] Id. In the SBMS Order, the Commission declined to issue a ruling that the term "call initiation" as used in the CMRS industry refers to the customer pressing the "SEND" button. Id. at 19905. This does not mean, however, as Petitioners apparently believe, that the Commission has found this practice to violate Section 201(b). To the contrary, the Commission simply made clear that it lacks the technical expertise to opine on what constitutes "call initiation" and that "[i]n the competitive marketplace CMRS providers may use different methods for defining the services they provide to their customers." Id.

[8/] Petitioners cite the Commission's statement in the SBMS Order that "if a carrier employs unreasonable practices, the carrier may be found to be in violation of Section 201(b), even if the rates and rate structure themselves are not unreasonable." Petitioners' Reply at 2-3 (citing SBMS Order, 14 FCC Rcd at 19904-19905). However, Petitioners fail to point to any activity by GTE in this case that would convert an otherwise perfectly lawful practice into a violation of Section 201(b). The essence of their complaint is that GTE did not disclose its rounding up practice on each and every customer bill, but courts have found that disclosure of this sort is completely unnecessary. In Alicke v. MCI Communications Corp., 111 F.3d 909 (D.C. Cir. 1997), for example, when MCI's practice of rounding up was challenged as misleading to customers because it was not disclosed on individual telephone bills, the D.C. Circuit Court of Appeals found that the practice "could not mislead a reasonable customer." The court explained that "[b]ecause no reasonable customer could actually believe that each and every phone call she made terminated at the end of a full minute, the customer must be aware that MCI charges in full-minute increments only." See also Marcus v. AT&T, 938 F.Supp. 1158, 1174 (S.D.N.Y. 1996), aff'd, 138 F.3d 46 (2d Cir. 1998) (carrier's failure to disclose rounding up in its advertising, marketing, or customer bills, did not mislead customers because "no customer could reasonably believe that a designation of a call in whole minutes accurately reflects the length of that call").

[9/] The fact that the state law claims are being heard in federal court does not shield them from preemption under Section 332(c)(3). See Baker v. Coughlin, 77 F.3d 12, 15 (2d Cir. 1996) ("federal court acts essentially as a state court in addressing pendent state law claims" and "if a state would not recognize a plaintiff's right to bring a state claim in state court, a federal court exercising pendent jurisdiction, standing in the shoes of a state court, must follow the state's jurisdictional determination and not allow that claim").

and rate structure, and that states cannot regulate either.[10/] In this regard, the Commission explained that "states do not have the authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments."[11/] As the Commission has noted in the long distance context, carriers compete on the basis of their rate structures as well as their rate levels, and customers are free to choose the carrier that offers the most attractive pricing package.[12/] For CMRS, neither aspect of pricing can be subject to state rate regulation.

The Commission also has determined that whether grant of the relief sought by a plaintiff would constitute rate regulation prohibited by Section 332 depends on the facts and circumstances of each particular case.[13/] Petitioners here are seeking damages based on GTE's rate structure characteristics, specifically the practice of rounding up. Despite Petitioners protests to the contrary, the judicial relief they seek would require the court to determine what a reasonable rate structure should be for GTE's CMRS service. This result is precisely what the Commission found to be precluded by Section 332(c)(3).[14/] As the Commission recognized in the WCA Order, a court will overstep its authority under Section 332 if in determining damages,

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[10/] Wireless Consumers Alliance, Inc., Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, Memorandum Opinion and Order, WT Docket 99-263, FCC 00-292, at ¶ 8 (rel. Aug. 14, 2000) ("states may not prescribe how much is charged for CMRS services or rate structures for CMRS") ("WCA Order"); SBMS Order, 14 FCC Rcd at 19907 ("the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and . . . the states are precluded from regulating either of these").

[11/] SBMS Order, 14 FCC Rcd at 19908 (emphasis added).

[12/] See Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, at 2 (dated Dec. 2, 1993).

[13/] WCA Order at ¶ 39.

[14/] WCA Order at ¶ 25; see also SBMS Order, 14 FCC Rcd at 19907.

it enters into a regulatory-type analysis that purports to determine the reasonableness of a CMRS rate.[15/]

Moreover, even though Petitioners have couched some of their state claims in terms of "nondisclosure," the Commission has made clear that a court must look behind the form of the pleading to determine whether a claim or remedy is preempted.[16/] As GTE explains, in the case at hand, Petitioners' true agenda is to obtain "damages equal to the difference between what GTE's customers paid for cellular service under the whole-minute billing rate structure and what they would have paid if GTE's rate structure were different."[17/] Petitioners "also specifically seek . . . an order 'enjoining GTE from charging on a Rounded Up basis.'"[18/] Under the Commission's decisions, a court may neither preclude the practice prospectively nor provide damages as a remedy for a carrier's prior decision to follow it.

III. THE COMMISSION HAS ALREADY RULED THAT COURTS SHOULD RESOLVE ISSUES BASED ON THE SPECIFIC FACTS AND CIRCUMSTANCES OF EACH PARTICULAR CASE

Petitioners appear to request a ruling based on the specific facts and circumstances of their case.[19/] The Commission ruled in both the SBMS Order and the WCA Order that such a determination would be inappropriate. For this reason, the Commission provided guidance for courts, such as the court in the White case, on the issues raised by Petitioners -- the

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[15/] WCA Order at ¶ 39.

[16/] Id. at ¶ 28.

[17/] Opposition of GTE Corporation, et al. at 10 (Feb. 10, 2000) (citing White Complaint at ¶¶ 44, 50, 57).

[18/] Id. (citing White Complaint at ¶ 57).

[19/] See Petition at 4-5 (conceding that rounding up is reasonable, but asking the FCC to decide whether GTE's rounding up practice "breached the unambiguous Contract"); Petitioners' Reply at 3-4 (requiring the Commission to consider whether GTE's practices were "undisclosed").

reasonableness of billing practices under Section 201(b) and the scope of preemption under Section 332.

In the SBMS Order, the Commission reviewed the lawfulness of billing practices under Section 201(b), in order to "clarify" uncertainty in the area and assist the courts.[20/] But the Commission refused to rule on the specific facts of the underlying case, leaving those issues for the courts to resolve.[21/] Similarly, in the WCA Order, the Commission refused to decide whether, given the facts and circumstances of the case, certain state-law damage claims were preempted by Section 332. While providing general guidance to courts, the Commission expressly declined to reach a decision on whether the particular claims presented were or were not preempted under Section 332:

> Nor do we here conclude that a damage award in the WCA litigation or any other specific case would or would not be consistent with Section 332(c)(3). We believe the question of whether a specific damage award or a specific grant of injunctive relief constitutes rate or entry regulation prohibited by Section 332(c)(3) would depend on all facts and circumstances of the case.[22/]

The SBMS Order and WCA Order provide sufficient guidance for the court to resolve Petitioners' claims in the underlying lawsuit. The Commission should again decline to determine either the reasonableness of these specific billing practices under Section 201(b) or whether the specific state-law claims and requested relief are preempted under Section 332.

CONCLUSION

For the foregoing reasons, the Commission should deny Petitioners' request for a declaratory ruling that GTE's billing practices, such as charging in whole minute increments,

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[20/] See SBMS Order, 14 FCC Rcd at 19900.

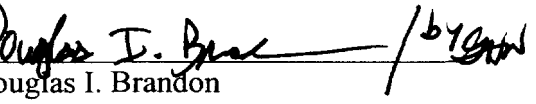
[21/] SBMS Order, 14 FCC Rcd at 19900, 19905, n.32.

[22/] WCA Order at ¶ 39.

violate Section 201(b) of the Act. In addition, the Commission should reject Petitioners' argument that their claims are not preempted under Section 332.

Respectfully submitted,

AT&T WIRELESS SERVICES, INC.



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October 20, 2000

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CERTIFICATE OF SERVICE

I, Ghita Harris-Newton, hereby certify that on this 20th day of October 2000, I caused copies of the attached "Comments of AT&T Wireless Services, Inc. " to be served via hand delivery or First Class Mail* upon the following:

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